

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ENVIRONMENTAL TREE & DESIGN, INC.¹

Employer

and

Case 28-RC-6204

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 872, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks an election in a unit comprised of all general laborer employees³ of the Employer at the La Reve Golf Course/Desert Inn, located at 3145 South Las Vegas Boulevard, Las Vegas, Nevada. The Employer contends that, given the fluctuating nature of its staffing needs, it would be inappropriate to hold an election at this time. Although a contraction in the bargaining unit is at hand, the Employer acknowledges that the services of at least two bargaining unit members will be required throughout the considerable duration of the Employer's work under its current contracts. Based upon this acknowledgement and the reasons more fully set forth below, I find that the petitioned-for unit is appropriate and that an election should be held, despite any imminent contraction of the unit.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. **Jurisdiction:** The Employer is a Texas corporation engaged in business as a tree relocation contractor at a jobsite located in Las Vegas, Nevada. The parties stipulated, and I find, that during the 12-month period ending July 14, 2003, the Employer, in the course and conduct of its business operations described above, had gross revenues in excess of \$500,000 and performed services valued in excess of \$50,000 in States other than the State of Nevada. The

¹ The name of the Employer appears as stipulated at the hearing.

² The name of the Petitioner appears as stipulated at the hearing.

³ This proposed unit reflects the Petitioner's amendment of its petition at the hearing. The Petitioner had originally petitioned for a unit consisting of all production and maintenance employees engaging in construction landscaping.

Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

a. Background to Contracting Unit Contention

The Employer performs tree relocation work, using specialized trucks and a large patented tree excavation device to excavate and transport the trees, on the Las Vegas jobsite under contracts it currently has with two entities, Wadsworth Golf Course and Wynn Design & Development. Under the Wadsworth Golf Course contract, the Employer removes large trees from the golf course, deposits them in a staging area, and transplants them back onto the course as golf holes are completed. As of the date of the hearing, substantially all of the trees have been removed from the golf course and placed in the staging area, and the Employer has begun to move the trees back to the course. Under the contract with Wynn Design & Development, the Employer is responsible for moving some trees from the golf course to a staging area. The Employer is responsible for monitoring the irrigation of the trees while they are in the staging area under both contracts.

The project began in December 2002, and the Employer hired new employees from Nevada and retained existing employees from Texas, including its three equipment operators, to work at the Las Vegas jobsite. The Employer's workforce has fluctuated since that time, ranging from approximately 6 employees initially, expanding to 30 in March 2003, contracting to 6 several months later, and increasing to its current level of approximately 15 total employees, including supervisors.

Thomas Cox, the Employer's president, testified that the project's maintenance requirements and, consequently, the Employer's labor requirements will likely decrease in or around mid-September 2003, due to improved weather conditions. However, Cox agreed that the Employer's tree relocation, planting, and maintenance responsibilities under the Wadsworth contract would continue through the spring of 2004. Cox estimated that there will be a need for the services of at least two laborers through the project's conclusion.

Additionally, the Employer is currently bidding, along with a few other companies, on the second phase of the Wynn contract, involving the relocation of the trees from the staging area to the hotel itself. The successful bidder will become responsible for the maintenance of the trees. While the bidding process was scheduled to conclude on July 29, 2003, Cox estimated that the bid period would be extended for 30 days. Cox anticipated that work on the new Wynn contract would begin in the first quarter of 2004, at which time the Employer, if awarded the new project, would be in a position to hire back laborers who had previously worked for the Employer. Cox estimated that there would be a staffing requirement through April 15, 2005, the

scheduled date of the hotel's opening. The Employer is not currently bidding on other Nevada projects.

Based on Cox's testimony, the Employer argues that the possibility of the contraction of the bargaining unit to one employee merits dismissal of the petition, since the Board cannot certify a bargaining unit of one employee.

b. Legal Analysis and Determination

When determining the propriety of granting an election in cases involving a contracting unit, the Board examines whether the present complement of employees is substantial and representative of those employees that eventually will be employed by the employer. *Douglas Motors Corp.*, 128 NLRB 307 (1960). In determining whether an employee complement is representative and substantial so as to warrant holding an immediate election, the Board follows a case-by-case approach and analyzes such factors as size of the employee complement at the time of the hearing, the nature of the industry, and the time expected to elapse before a full, or substantially larger, complement of employees is on hand. See *Clement-Blythe Companies*, 182 NLRB 502 (1970).

In the contracting unit situation, the Board will not find a mere reduction in the number of employees as basis to find that a substantial and representative complement of employees no longer exists. Instead, the Board takes into consideration several factors, including whether the reduction of employees is a result of a "fundamental change in the nature of the Employer's business operations," *Douglas Motors*, 128 NLRB at 308. See *MJM Studios of New York, Inc.*, 336 NLRB No. 129 (2001). The Board also considers whether the unit contraction will result in complete dissolution of the unit within a relatively short period of time, as in *NLRB v. Engineers Constructors, Inc.*, 756 F. 2d 464, 468 (5th Cir. 1985), where the Court noted that the Board has consistently held that when a job is scheduled for completion within four months, no useful purpose is served by determining representation. See *Davey McKee Corporation*, 308 NLRB 839, 840 (1992); *Larson Plywood Company, Inc.*, 223 NLRB 1161 (1976); *Plum Creek Lumber Co., Inc.*, 214 NLRB 619 (1974); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974); *General Motors Corporation*, 88 NLRB 119, 120 (1950); *Fraser-Brace Engineering Company, Inc.*, 38 NLRB 1263, 1264 (1942); *Fruco Construction Company*, 38 NLRB 991, 993 (1942); *Ohio Public Service Company*, 36 NLRB 1269 (1941). Finally, the Board will also consider the Employer's future plans, provided those plans are not speculative. See *Cooper International, Inc.*, 205 NLRB 1057 (1973).

Applying the foregoing principles to the Employer's operations, I find that the Employer's plans for the future are not sufficiently certain to warrant dismissal of the petition. In this regard, Cox stated that the services of two or three general laborers would likely be required through the project's conclusion next spring. Although Cox's response to a general question about the reduction of the workforce included the possibility of contraction of the unit to zero or one employee, he concurred with the specific statement that at least two laborers would be necessary through the completion in the project next spring which is approximately eight months from now. Because this is a substantial period of time, determining representation now would not be futile. Moreover, the Employer's admittedly positive current relationship with

the Wynn project enhances the prospect of the Employer securing the second phase of the Wynn contract. In reaching this decision, I do not attempt to determine how many of the Employer's employees will in fact remain in the spring of 2004, but there is a likelihood that there will be additional employment opportunities for the Employer's laborers. Accordingly, based on the foregoing and the record as a whole, I shall direct an election in the unit found appropriate herein, and, thus, permit unit employees to have an opportunity for immediate representation rights, if they so choose.

4. **Unit Finding:** The eight general laborers currently employed by the Employer, one of whom is on workers compensation leave, constitute the petitioned-for unit. These general laborers are employees hired in Nevada who perform a variety of tasks, including shoveling, watering, raking, and cleanup work. No specialized training is required to perform these tasks. These workers are paid hourly and are supervised by Jose Herrera. At the hearing, the parties stipulated, and I find, based on the record before me, that Jose Herrera, as well as the Employer's resident agent, Paula Gray, are to be excluded from the unit.

The three employees who operate the tree-moving equipment travel from Texas at the Employer's expense to operate the equipment at the Las Vegas jobsite. The equipment operators receive safety and operational instruction and possess a commercial driver's license. These employees are paid several dollars more per hour than general laborers. None of the employees hired in Nevada is qualified to operate the equipment.

A college intern specializing in urban forestry, Melissa Bradford, also works at the jobsite monitoring the irrigation and health of the trees and formulating fertilizer rates. She will leave the project in January 2004, but has the expectation of returning after completing an additional semester of undergraduate studies. She occasionally performs work that laborers typically perform, such as filling in holes with a shovel and watering with a hose, but she mainly functions as a technician.

Thomas Ashworth, one of the jobsite's managers with supervisory responsibility and the authority to hire and fire employees, directs work, performs timekeeping duties on the jobsite, and acts as a liaison with the project owner in the absence of Cox. Ashworth also operates equipment when necessary.

While a bargaining unit must be appropriate, it does not have to be the optimum or most appropriate unit. *Home Depot USA, Inc.*, 331 NLRB 1289, 1290 (2000); *Overnight Transportation Co.*, 322 NLRB 723 (1996). Because no other labor organization seeks a unit different from that requested by the Petitioner, the sole issue is whether the unit requested by the Petitioner is an appropriate unit. *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971).

The existence or lack of a shared community of interest determines the appropriateness of a petitioned for unit. *Home Depot USA, Inc.*, 331 NLRB at 1290; *The Boeing Company*, 337 NLRB No. 24 (2001). Method of compensation, employment benefits, and differences in job functions are among the relevant factors used to determine community of interest among distinct employee classifications. *Home Depot USA, Inc.*, 331 NLRB at 1291.

The Employer's counsel did not dispute the appropriateness of the petitioned-for unit at the hearing, but simply declined to stipulate to the exclusion of the individuals and classifications described above. In its post-hearing brief, the Employer agreed that the appropriate bargaining unit should be limited to the eight general laborers. In light of the Petitioner's and the Employer's accord on this issue, and because of the common supervision, working conditions, job duties, and wages, I find that the petitioned-for unit composed of general laborers is an appropriate unit.

Based on the foregoing, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All general laborer employees of the Employer at the La Reve Golf Course/Desert Inn, located at 3145 South Las Vegas Boulevard, Las Vegas, Nevada.

EXCLUDED: All other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

There are approximately 8 employees in the unit found appropriate.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

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LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Region 28 Resident Office, 600 Las Vegas Boulevard South, Suite 400, Las Vegas, Nevada 89101, on or before August 11, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by August 18, 2003. A copy of the request for review should also be served on the undersigned.

Dated at Phoenix, Arizona, this 4th day of August 2003.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board - Region 28